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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

CRIMINAL FILE NO.
08-30 (MJD/SRN)

Donald Ray Tate,

DEFENDANT.

SENTENCING

AUGUST 10, 2009

10:00 A.M.

THE ABOVE-ENTITLED MATTER came on for hearing before
The Honorable Michael J. Davis, Chief Judge in United States
District Court.

REPORTED BY: SHEILA G. SMITH
Court Reporter/Notary Public

1 APPEARANCES:

2
3 FOR THE PLAINTIFF:

4 MICHAEL DEES, Assistant U.S. Attorney,
5 U.S. Attorney's Office, 600 U.S. Courthouse, 300 South
6 Fourth Street, Minneapolis, Minnesota 55415.

7
8 FOR THE DEFENDANT:

9 RICHARD KYLE and KRISTINE BOYLAN,
10 Attorneys at Law.

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1 THE CLERK: USA versus Donald Ray Tate,
2 Criminal Case Number 08-cr-30.

3 Counsel, please state your appearances.

4 MR. DEES: Good morning, Your Honor.
5 Michael Dees, Assistant United States Attorney, on
6 behalf of the Government.

7 MR. KYLE: Richard Kyle and Kristine Boylan
8 on behalf of the Defendant, who is present.

9 THE COURT: Good morning. Step forward for
10 sentencing.

11 Counsel, have you had an opportunity to
12 review the pre-sentence investigation report in this
13 matter?

14 MR. DEES: The Government has, Your Honor,
15 and has no news objections or corrections other than
16 what was stated prior about the aggravated robbery in
17 the first degree instead of the second degree.

18 MR. KYLE: Your Honor, the defense has
19 submitted all of our objections and corrections, and
20 I have no further objections or corrections this
21 morning.

22 THE COURT: All right. The court will make
23 the following changes in the pre-sentence
24 investigation report:

25 The footnote on page 1 is stricken and will

1 be taken out.

2 On page 3, paragraph 14, the two-level
3 enhancement that was given because of the allegation
4 that the gun was stolen, that will be taken out, so
5 the total offense level is 24, still armed career
6 criminal to be 31.

7 And then on page 6, paragraph 24, I was
8 informed by the probation officer that he was
9 convicted of or adjudicated as an extended juvenile
10 jurisdiction for aggravated robbery in the first
11 degree, not the second degree.

12 Those are the changes to be made in the
13 pre-sentence investigation report, and the Court will
14 adopt all the other paragraphs as its own, and those
15 paragraphs as amended by the Court.

16 Counsel, have you had an opportunity to
17 review the advisory guideline calculations as
18 prepared for the Court by the probation officer?

19 MR. KYLE: Yes, we have, Your Honor.

20 THE COURT: Any objections to those
21 calculations.

22 MR. KYLE: No objections beyond what we
23 have already submitted, Your Honor.

24 MR. DEES: No objections.

25 THE COURT: Total offense level of 33,

1 armed career criminal, criminal history points of 9,
2 category 4, imprisonment range of 188 to 235 months,
3 supervised release of three to five years, fine range
4 of 17,500 to 175,000, and special assessment of \$100.

5 Mr. Kyle, do you wish to be heard?

6 MR. KYLE: Yes, Your Honor, just briefly.
7 I understand the Court has made a decision on the
8 armed career criminal. Just for the record,
9 obviously we've already submitted and both sides have
10 briefed the issue; it is our position, though, that
11 these prior drug offenses that Mr. Tate had pled
12 guilty to really do represent a single, you know,
13 episode, and I think it's too bad that the -- I
14 understand the Eighth Circuit case law that the
15 Government has cited for these kinds of matters, but
16 I think if you -- you know, continually when we have
17 cases like this where we've got undercover deals by
18 the same police department, same informant, same
19 officer on couple different days, the same defendant,
20 they really are more like a continuing episode. It's
21 these police, really, that are dictating the terms
22 more than the individual defendant.

23 I'm not going to say anything more than
24 that. We've briefed the subject, and I believe
25 that's an issue that we can take up later.

1 As far as the sentence, Your Honor, we
2 would ask that -- Mr. Tate's guideline range is
3 obviously higher than the 15-year mandatory minimum,
4 but we would ask that the Court depart and vary its
5 sentence downward to 15 years. It's not a big
6 departure, it's guidelines of 188 to 235, but it's a
7 huge amount of time for a young man like this.

8 And Mr. Tate's made mistakes. He's made
9 mistakes very recently. But, you know, they're young
10 man mistakes, and he obviously deserves time, but 15
11 years is just an incredible amount of time for a
12 fellow who is as young, as capable as my client, and
13 I would ask that the Court, you know, vary its
14 sentence downward. It would only be going eight
15 months below, you know, what's the low end of his
16 guideline.

17 He has family that are supportive of him
18 that are here today -- his mother, his aunt,
19 girlfriends, you know, they are supportive, they want
20 to see him again; and he wants to see his kids again,
21 you know, before they become adults.

22 So we would ask the Court to vary its
23 sentence downward just slightly to give him a 15-year
24 minimum.

25 THE COURT: Donald Ray Tate, do you have

1 anything to say to the Court? You have an absolute
2 right to talk to me and tell me anything you want to
3 tell me about yourself or this offense or anything
4 else you wish to tell me before I sentence you.

5 THE DEFENDANT: Yes, Your Honor. All I
6 really have to say is, you know, I want to apologize
7 for the inconvenience of my family, the Court,
8 myself, and I put a lot of people through a lot of
9 things right now.

10 And, you know, like my attorney said, you
11 know, I made a lot of mistakes, you know, bad
12 choices, and I just ask that, you know, I get a
13 little leniency and don't be punished too harsh so I
14 can, you know, be back out there and still be a part
15 of my kids' life and have my own life myself.

16 And that's all I have to say, Your Honor.

17 THE COURT: Can you tell me why you didn't
18 show up when you were supposed to show up?

19 THE DEFENDANT: I was scared, Your Honor.

20 THE COURT: You destroyed your electronic
21 monitoring device. That's \$385. Do you know that?

22 THE DEFENDANT: No, I didn't.

23 THE COURT: You didn't destroy it?

24 THE DEFENDANT: Well, I destroyed it, but I
25 didn't know how much it cost.

1 THE COURT: Now, what were you scared
2 about?

3 THE DEFENDANT: The time. I was facing a
4 lot of time.

5 THE COURT: Well, you just increased your
6 time. I don't know how you can think you can come in
7 here and destroy a monitor and escape and we have to
8 send out the marshals when I allowed you to be in a
9 halfway house. I could have had you locked up a long
10 time ago. That's ...

11 Well, I don't know how you can think I can
12 give you less time for escaping and having the
13 marshals go hunt for you than I would have been able
14 to if you had shown up on time.

15 (Pause.)

16 Anything else you want to say?

17 THE DEFENDANT: No, Your Honor.

18 THE COURT: All right.

19 Mr. Dees?

20 MR. DEES: First, Your Honor, in reference
21 to the issue of whether Mr. Tate is a career
22 criminal, I'll rely on my sentencing pleading, and I
23 have a certified copy of Government's Exhibit 1 which
24 was referenced in that pleading.

25 As to Mr. Tate's sentence, Mr. Tate now

1 stands before you convicted of being a felon in
2 possession of a firearm. Here is a man who has been
3 given multiple, many opportunities. It's not about
4 mistakes; it's about failing to take advantage of
5 those opportunities that have been bestowed on
6 Mr. Tate.

7 He started his criminal career as an adult
8 at the age of 16 with an aggravated robbery. That
9 aggravated robbery was a violent robbery, but
10 Mr. Tate was given a chance. He was given an EJJ
11 sentence, he was sent to Glen Mills, he was given
12 extensive programming.

13 THE COURT: We will put in the record that
14 he shot his partner in crime, shot the victim twice.
15 I don't know why he wasn't certified as an adult, but
16 they didn't.

17 Let's get the record straight: It wasn't
18 just, "Give me your wallet or you'll get hurt;" the
19 victim was shot twice.

20 MR. DEES: Exactly, Your Honor. But he was
21 still given, nonetheless, a chance on EJJ status.
22 Four months after being released from Glen Mills
23 Mr. Tate found himself involved in an extensive drug
24 transaction behind Jackson Elementary School in St.
25 Paul where the participants of this business actually

1 took over homes of elderly people right across from
2 the elementary school to sell the drugs.

3 Mr. Tate was not taken into custody; he was
4 allowed to get his life together. His EJJ sentence
5 was not revoked until April of the next year.

6 And as the Court is keenly aware, Mr. Tate,
7 after having his EJJ sentence revoked, was not sent
8 directly to adult prison; he was given actually
9 workhouse time, which is unheard of as far as the EJJ
10 sentencing. The way the law works is once you
11 violate, you go directly to adult prison. Mr. Tate
12 was given another chance.

13 Unfortunately for Mr. Tate, he eventually
14 was sent to prison based on the four felonies that he
15 picked up during the drug business. He was released
16 in May of '07. Five months later he finds himself
17 with another offense, which is what we stand before
18 you today on.

19 Mr. Tate was given a chance by you. As you
20 had told Mr. Tate, he was given a chance. He could
21 have been sitting waiting for sentencing; he wasn't.

22 Mr. Tate has been given multiple chances.
23 Now it's time for an adult sentence. He is no longer
24 a young man. If he commits adult crime, he has to do
25 the time. Unfortunately for Mr. Tate, a guideline

1 sentence is what his criminal history dictates in
2 this matter.

3 THE COURT: On December 17, 2008 the
4 Defendant was found guilty by jury of a one-count
5 indictment -- he was found guilty of felon in
6 possession of a firearm on October the 4th, 2007, in
7 violation of Title 18, United States Code, Section
8 922(g)1 and 924(e)1, a Class A felony.

9 (Pause.)

10 Mr. Tate, it's unfortunate that it happens
11 so many times that nothing happens to individuals in
12 the state system or they're given slaps on the hand,
13 and finally, when they come to Federal Court --

14 At first people realize, "Oh, this is state
15 court; I'll get probation," or, "I'll do a year in
16 the workhouse," or something of that sort; and then
17 when their attorneys come and tell you, "Wait a
18 minute, you're looking at 15 as a minimum sentence,"
19 "You're lying. That can't be. I've never served
20 more than a year or two in prison. You're telling me
21 I'm going to stay in jail for 15 years?" And it
22 becomes very difficult for individuals to come to
23 grips with that.

24 But it's impossible for the families to
25 understand, because they love you and they want you

1 home and you have children, and it becomes one of,
2 "Oh, the judge is being mean," or, "The prosecutor's
3 being mean."

4 That's not the case. The United States
5 Government has made these statutes for a reason, for
6 those individuals where the state system cannot
7 handle or will not handle violent offenders.

8 We've had a trial in this matter. The jury
9 was found you guilty. We've had extensive motions on
10 this matter on whether or not you should get a new
11 trial.

12 The Court has heard all those motions and
13 reviewed all the records of the arresting officer to
14 see if there was anything that should be turned over
15 to the Defendant that would be usable on a new trial
16 to impeach his credibility, and there was not. So
17 we're here.

18 (Pause.)

19 I took a chance on you in letting you out
20 and letting you at the halfway house on electronic
21 monitoring, and, well, there was a chance that -- I
22 knew that there was a possibility that you would
23 violate that. That's a possibility with everybody,
24 so it's just not you. Everyone gets scared, but it's
25 how they react to it.

1 You're 25 years of age, and when you add 25
2 and 15, you get to 40, don't you? So the vast
3 majority of your life will have been spent in prison.

4 Do I want that? No. Is that the life you
5 made? Yes. The Court cannot go down below the
6 mandatory minimum sentence on violent offense, or any
7 mandatory minimum. There is legislation being
8 offered in Congress to possibly go under a mandatory
9 minimum, but I am certain that none of those criteria
10 will be met by you. But that will be reviewed at a
11 different time and a different place.

12 But at this point I -- even with you
13 running, even with you causing the loss of \$385 to
14 our electronic monitoring --

15 Do you know what that means? That's one
16 less person that I can let out. That means that
17 person has to sit in jail. Do you think they like
18 that?

19 You're going to be -- I can tell you the
20 process that you're going to have while you're in
21 prison. The first five to seven years you're going
22 to be angry. You're going to be disruptive in
23 prison. This is the normal course of young adults
24 being locked up for long periods of time.

25 And then you'll get older and wiser and

1 figure out that that's not going to get you anywhere,
2 that you're going to have to figure out what kind of
3 job skills you're going to get while you're in prison
4 and work for your betterment, because the fewer times
5 that you're locked up and have your good time taken
6 away, the quicker you'll get out of prison.

7 I'm just telling you what the normal course
8 is. There's hundreds and hundreds of young adults
9 that I have seen come through just like you. I visit
10 the prisons, and I see what happens, so I'm in touch
11 with reality and understanding 15 years is a long
12 period of time. In 15 years I'll probably be dead.

13 So it does not give me any pleasure sending
14 you away for that amount of time.

15 (Pause.)

16 The Court has found that you are a career
17 criminal, career armed criminal, and will sentence as
18 such.

19 You are sentenced to the care and custody
20 of the Bureau of Prisons for a period of 180 months.
21 No fine is imposed. Restitution in the amount of
22 \$385 is due and payable to the United States District
23 Court for the District of Minnesota -- and that will
24 be payable to the Clerk of Court -- for the
25 destruction of the electronic monitor transmitter

1 that you destroyed while you were on release.

2 You are sentenced to a term of five years
3 supervised release. The mandatory conditions are
4 applicable. The Defendant must report to the United
5 States Probation Office in the district in which the
6 defendant is released within 72 hours of release from
7 the custody of the Bureau of Prisons.

8 Next, Defendant shall not commit any
9 crimes, federal, state or local.

10 Next, Defendant shall not illegally possess
11 a controlled substance, shall refrain from any
12 unlawful use of a controlled substance; the Defendant
13 shall submit to one drug test within 15 days his
14 release of prison and thereafter as determined by the
15 Court.

16 And the Court will make note that when you
17 were found by the marshals, you had a small amount of
18 marijuana on your person. That was destroyed, and
19 the City of Apple Valley was not going to charge you
20 with that minor possession.

21 Forfeiture of the Smith and Wesson Model
22 66.357 magnum caliber revolver, Serial Number 47K3397
23 will take place. That gun will be forfeited and
24 turned over to the United States Government.

25 Next, the Defendant shall abide by the

1 standard conditions of supervised release that have
2 been adopted by the Court, including the following
3 special conditions:

4 One, the Defendant shall participate in a
5 program for substance abuse as approved by the
6 probation officer. That program may include testing,
7 an in-patient or out-patient treatment counseling or
8 support group.

9 Further, the Defendant shall contribute to
10 the cost of such treatment as determined by the
11 Probation Office, the co-payment program not to
12 exceed the total cost of treatment.

13 Next, if not employed at a regular lawful
14 occupation as deemed appropriate by the probation
15 officer, the Defendant may be required to perform up
16 to 20 hours of community service per week until
17 employed.

18 The Defendant may also participate in
19 training, counseling, daily job search or other
20 employment-related activities as directed by the
21 probation officer.

22 Next, the Defendant shall submit his
23 person, residence, office, vehicle or other area
24 under the Defendant's control to a search conducted
25 by the United States probation officer or supervised

1 designee at a reasonable time in a reasonable manner
2 based upon reasonable suspicion of contraband or
3 evidence of a supervision violation.

4 The Defendant shall warn any other
5 residents or third parties that the premises and
6 areas in the Defendant's control may be subject to
7 searches pursuant to this condition.

8 Next, the Defendant shall not associate
9 with any member, prospect, or associate member of the
10 Gangsters Disciples gang or any other gang. If the
11 Defendant is found to be in the company of such
12 individuals while wearing clothing, colors, or
13 insignia of the Gangster Disciples gang or any other
14 gang, the Court will assume this association was for
15 the purpose of participating in gang activities.

16 Finally, there's a \$100 special assessment
17 payable to the Crime Victims Fund which is required
18 by statute to be paid immediately.

19 Sir, if you feel that the Court has not
20 followed the law in your sentencing or if you feel
21 that the Court or the jury did not appropriately find
22 you guilty at trial, you have a right to appeal your
23 sentence and your trial to the Eighth Circuit Court
24 of Appeals, which sits in St. Louis.

25 Mr. Kyle and Ms. Boylan will be your

1 attorneys on that appeal. That appeal has to be
2 noticed to the Court of Appeals within ten days of
3 today's date. And because there's so many issues
4 involving your case, I will order that Mr. Kyle file
5 that Notice of Appeal so your rights are preserved.

6 Anything further for the defense?

7 MR. KYLE: Your Honor, we will file that
8 Notice of Appeal. The only other thing, I'd ask the
9 Court to make a recommendation to the Bureau of
10 Prisons that Mr. Tate be incarcerated as close to the
11 Twin Cities or Minnesota as possible. He has a lot
12 of family here.

13 THE COURT: I will recommend that he be
14 housed in Sandstone, but more than likely he'll go to
15 Oxford, Wisconsin, because of the violence in his
16 background.

17 MR. KYLE: That's my understanding.

18 THE COURT: Anything further for the
19 Government?

20 MR. DEES: Nothing for the United States.

21 THE COURT: All right. Mr. Tate, do you
22 understand your sentence?

23 THE DEFENDANT: Yes.

24 THE COURT: You understand that's a
25 mandatory minimum sentence that I've given you of 15

1 years? What that means is that no argument by your
2 attorney and nothing the Government could do could
3 allow the Court to go below the 15 years. Do you
4 understand that?

5 THE DEFENDANT: Yes.

6 THE COURT: All right. And it's a sad day.

7 MR. KYLE: Your Honor, I just have one more
8 thing. Mr. Tate does have some children that are out
9 in the hallway; I'm wondering if it's possible before
10 he's taken away by the marshals to at least see those
11 kids.

12 THE COURT: He can have a seat. The
13 marshals will be right by, and they can be in the
14 first row, so he can talk to them for a few minutes
15 before he goes off to prison.

16 MR. KYLE: Thank you.

17 THE COURT: And he can talk to is his
18 mother here.

19 MR. KYLE: His mother is here as well.

20 THE COURT: Girlfriends here, too? You can
21 talk to them as well.

22 All right. Anything further?

23 MR. KYLE: Nothing further.

24 THE CLERK: All rise. Court is now in
25 recess.

1 (Proceedings concluded at 10:30 a.m.)
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1 STATE OF MINNESOTA)

2) ss:

REPORTER'S CERTIFICATE

3 COUNTY OF HENNEPIN)

4 I, SHEILA G. SMITH, do hereby certify that the
5 foregoing is a correct transcript from the record of
6 proceedings in the above-entitled matter.
7

8 s/Sheila G. Smith

Date: February 5, 2010

9 Sheila G. Smith

Court Reporter/Notary Public
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